

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. SC84060
	)	
JAMES E. BRATINA,	)	
	)	
Respondent.	)	

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Appeal From  
The Circuit Court of Cape Girardeau County  
Division III, Thirty Second Judicial Circuit  
Honorable Gary A. Kamp

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RESPONDENT'S BRIEF

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## **JURISDICTIONAL STATEMENT**

This is an appeal by the State of Missouri from a judgment entered by Judge Gary A. Kamp, Cape Girardeau County Circuit Court, Division III, sustaining respondent James E. Bratina's motion to dismiss Count I of a criminal prosecution of respondent under RSMo. Section 194.425. The trial court held that RSMo. Section 194.425 is unconstitutional. This matter is within the exclusive jurisdiction of the Missouri Supreme Court because it involves the constitutional validity of a Missouri statute. Missouri Constitution, Article V, Section 3.

### **STATEMENT OF FACTS**

For the purposes of this appeal, respondent adopts the Statement of Facts provided by appellant. In that this case was dismissed upon a motion, there has been no formal reception of evidence. The Statement of Facts adopted for this appeal comes solely from a probable cause affidavit filed by a law enforcement officer [L.F. 13-14]. By adopting this Statement of Facts for purposes of this appeal, respondent does not admit or accept the accuracy of the conclusions, opinions, and facts stated in the probable cause affidavit.

### **POINT RELIED ON**

The trial court did not err in dismissing Count I, which charged abandonment of a corpse, because the trial court correctly held that RSMo. Section 194.425 was unconstitutionally vague, in that, the statute does not give sufficient notice and fair warning to persons of ordinary intelligence of what conduct is prohibited, it inadequately informs persons of ordinary intelligence what obligations they have under the statute, and the statute fails to give adequate guidance to prosecuting authorities to prevent arbitrary and discriminatory application.

*State v. Young*, 695 S.W.2d 882 (Mo. banc 1985)

*State v. Hatton*, 918 S.W.2d 790 (Mo. banc 1996)

*State v. Lee Mechanical Contractors, Inc.*, 938 S.W.2d 269 (Mo. banc 1997)

*State v. Aldrich*, 231 N.W.2d 890 (Iowa 1975)

Amendments V and XIV, United States Constitution

## ARGUMENT

THE TRIAL COURT DID NOT ERR IN DISMISSING COUNT I, WHICH CHARGED ABANDONMENT OF A CORPSE, BECAUSE THE TRIAL COURT CORRECTLY HELD THAT RSMO. SECTION 194.425 WAS UNCONSTITUTIONALLY VAGUE, IN THAT, THE STATUTE DOES NOT GIVE SUFFICIENT NOTICE AND FAIR WARNING TO PERSONS OF ORDINARY INTELLIGENCE OF WHAT CONDUCT IS PROHIBITED, IT INADEQUATELY INFORMS PERSONS OF ORDINARY INTELLIGENCE WHAT OBLIGATIONS THEY HAVE UNDER THE STATUTE, AND THE STATUTE FAILS TO GIVE ADEQUATE GUIDANCE TO PROSECUTING AUTHORITIES TO PREVENT ARBITRARY AND DISCRIMINATORY APPLICATION.

The issue in this appeal is the correctness of the trial court's judgment dismissing prosecution of respondent James E. Bratina under RSMo. Section 194.425, wherein it was alleged that the respondent had committed the offense of abandonment of a corpse. The State has appealed from the trial court's judgment pursuant to RSMo. Section 547.200. The applicable standard of review for the claim of error raised by the State is the review of a question of law, therefore the review by this court is *de novo*. *State v. Smith*, 988 S.W.2d 71, 75 (Mo. App. 1999). Further, respondent suggests that the appropriate standard of review where a statute or ordinance is challenged as being unconstitutionally vague, and which statute or ordinance does not have First Amendment

freedom implications, is that the case must be “examined in the light of the facts of the case at hand.” *State v. Hatton*, 918 S.W.2d 790, 792-793 (Mo. banc 1996), citing *United States v. Powell*, 423 U.S. 87, 92 (1975); *State v. Lee Mechanical Contractors, Inc.*, 938 S.W.2d 269, 271 (Mo. banc 1997). Stated otherwise, if the abandonment of a corpse is not an activity protected by the First Amendment, then for respondent to prevail, and for the trial court to be correct, RSMo. Section 194.425 can be found to facially violate the due process clause only if the prohibition contained in that section proscribes “no comprehensible course of conduct at all and the statute cannot constitutionally be applied to any set of facts.” *State v. Hatton*, 918 S.W.2d 790, 792, citing *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494-495 (1982).

In determining if a criminal statute is unconstitutionally vague, the Fourteenth Amendment to the United States Constitution demands that the statute give fair warning of the act/omission/conduct that is prohibited. *State v. McMilian*, 649 S.W.2d 467, 471 (Mo. App. 1983), citing *Bowie v. City of Columbia*, 378 U.S. 347, 350 (1964). Moreover, it is generally recognized that a second prong of the void for vagueness test is whether or not there is sufficient guidance afforded, through explicit standards, to those who must apply the statute, avoiding possibly arbitrary and discriminatory application. *State v. Young*, 695 S.W.2d 882, 884 (Mo. banc 1985), citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Respondent suggests that the statute under review in this case violates both prongs of the void for vagueness test, and for that reason the judgment of the trial court should be affirmed.

The statute in issue in this case reads as follows:



**“194.425. Abandonment of a corpse without notifying authorities, penalty. – 1. A person commits the crime of abandonment of a corpse if that person abandons, disposes, deserts or leaves a corpse without properly reporting the location of the body to the proper law enforcement officials in that county.**

2. Abandonment of a corpse is a Class D. Felony.”

This statute was House Bill 160 in the Session Laws of 1995, and was apparently intended to be codified at Section 578.157, which contains miscellaneous offenses in the criminal code. However, it was codified at RSMo. Section 194.425 in a chapter titled “Death – Disposition of Dead Bodies.”

Respondent initially suggests to the court that the language in the statute which reads “if that person abandons, disposes, deserts or leaves a corpse” is both vague on its face, and when viewed in light of the conduct alleged in this case. The legislature chose four “action words” for this statute, tied together in the disjunctive. Those actions which are prohibited being to *abandon*, to *dispose*, to *desert* or to *leave* a corpse. The first three of those actions, to-wit, to *abandon*, to *dispose* and to *desert* all appear to refer to the same type of act, namely to depart from something or to do away with something, with no intention to further claim an interest in that item. In fact, the word *abandon* is defined to mean “to give up with intent of never again resuming one’s right or interest; to forsake entirely; to relinquish all connection with or concern in; to desert.” See, *Black’s Law Dictionary*, Sixth Edition. The word *leave* is defined as “to allow or cause to remain; to let remain, unmoved or undone; to refrain from or neglect taking, doing or changing; to

let stay or continue; to let be without interference; to suffer to remain subject to another's action, control, or the like." See, *Black's Law Dictionary*, Sixth Edition.

Defendant suggests that the use of the word "leaves" in the definition of the crime, in conjunction with the other words, creates vagueness as to whether or not the legislature intended to make it a crime simply to walk away from a corpse, or if it is intended to require a situation where the person actually has some peculiar knowledge of or interest in the corpse, or dealings with the corpse, and the person leaves that corpse at some location chosen by the actor, with no intention to return. Otherwise stated, does the word "leave" refer to the person's act in departing the location where the corpse happens to be, or does it refer to the fact that the corpse is "left behind" by the actor, and the actor's intention is to thereby disclaim any further interest in the corpse. By way of example, and admittedly in the abstract, if two people who are strangers to each other are standing on the side of a roadway, and one of them steps into traffic and is hit by a car and is obviously fatally injured, and laying upon the pavement, if the other pedestrian chooses to simply walk away without making any report, proper or otherwise, to a law enforcement authority, has that other pedestrian violated the terms of RSMo. Section 194.425?

In the context of this case, based upon the facts alleged, it is obvious that respondent neither abandoned, disposed of, nor deserted the corpse of his wife. Based upon the allegations, the corpse was left at the family residence and respondent went to his place of employment, and then returned some hours later. It was then that a 911 call was made by respondent. If the word "*leave*" as used in RSMo. Section 194.425 is

interpreted to have a meaning different than the other prohibited actions in the statute, i.e. *abandon, desert, dispose*, then it may be that the actions of the respondent in this case could come within the terms of the statute. However, given the way the statute is phrased, how is a person to know precisely when he violates the statute so interpreted? Within the context of the facts involved here, if it is true that respondent knew that his wife was dead, and he went from the room where she was found into the garage and stayed in the garage for four hours and then called the police, has the statute been violated? If he left the residence in a state of dismay, grief or shock, and walked about the neighborhood for four hours and then called the police, would the statute have been violated? The terms of the statute do not answer these questions, and it is left to the whim of a prosecuting attorney to decide what the statute means and when to apply it.

Respondent further suggests that the legislature's use of the term "without properly reporting the location of the body" causes this statute to be unconstitutionally vague. Respondent has not found any other statute in the State of Missouri where the phrase "properly reporting" is used. Neither are any statutes found in Missouri with the inverse of that phrase, or variations using the words "report" and "proper."<sup>1</sup> Respondent suggests that this phrase leaves the average person uncertain and confused as to what is required in the way of reporting, both as to the manner of the report and the timing of the report. Is a telephone call from the location of the corpse required? Is it permissible to

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<sup>1</sup> Counsel has used the LOIS Professional Library for Missouri statutes to perform these searches. The term "proper," by itself, showed 1,595 "hits" in the Missouri statutes.

leave the corpse to find a telephone? If a person has a usable cell phone at the location where the corpse is, but that person leaves that location and travels 30 minutes to another location and then calls from a public telephone, is this permissible under the statute? Can the location of the corpse be reported by letter or perhaps electronic mailing? And, precisely when must the person make the report? The statute, as constructed by the legislature, does not answer these questions, and leaves it to the average person to guess how and when a report should be made to comply with the law.

In the same legislative session when the statute in issue was passed, the legislature adopted RSMo. 306.141(L. 1995 H.B.Mo. 217 Section A), which outlaws leaving the scene of a vessel accident. In that statute, the legislature makes it clear that it knows how to specify a time when the report of an incident is to be given, by stating that the operator of a vessel who been involved in injury to another person is required to stop and give specified information to the other party or to a water patrol or law enforcement officer, and if no such officer is in the vicinity, “then *without delay* to the nearest police station or a judicial officer” (emphasis added). The vehicular accident leaving the scene statute, RSMo. Section 577.060 does not contain comparable “without delay” language, but it does contain its own sense of prompt action when it states that the individual is to report an accident “to the nearest police station or judicial officer.” Unfortunately, in RSMo. Section 194.425, the legislature has failed to be sufficiently specific to give the average person direction as to what is required to comply with the statutory directive.

The statute in question here provides no such direction to the average person as to what “proper” means so far as the manner and timing of the report are concerned. Under

the facts at hand, the State suggests it can prove respondent knew his wife was deceased, and he did not report it “properly” for four hours. Where in the statute is this period of time declared to be unlawfully excessive? This, of course, invokes the second prong of the void for vagueness test. The statute in question gives no guidance, through explicit standards or otherwise, as to the scope of “proper” reporting. Is there a mandatory time frame? Is there a mandatory method? Does this depend upon the whim of the prosecuting authority to determine when the statute has been violated, and when it has not? Respondent suggests that no such standards are contained in the statute, and for that reason it should be determined to be void for its vagueness. Some standard must be applied, and it is apparently left to the prosecuting authority to decide initially what the standards are, and then for a court to make a further determination. Our courts have consistently held that it is improper and inherently dangerous to permit the legislature to “set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who should be rightfully detained and who should be set at large.” *State v. Shaw*, 847 S.W.2d 768, 775 (Mo. banc 1993), citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1972). This statute is just such an improperly large net.

Respondent suggests that this court’s opinion in *State v. Young*, 695 S.W.2d 882 (Mo. banc 1985) is instructive, although not controlling, on the issue presented here. In that case, the court held RSMo. Section 578.050 (1978) to be void because of the vagueness in the statute. The failing of the statute in that case was that it could impermissibly be imposed upon a person who was merely “present” at a building where a cock fight was occurring or had occurred, and it contained no requirement of an unlawful

intent. The court found that the statute was not sufficiently clear so as to give reasonable notice of the prohibited conduct, and to apprise enforcers of the statute of any proper standards for enforcement. *Id* at 486. The language interpreted by the court in *State v. Young* is obviously different from the language involved here. However, the principals involved are the same, and an identical holding should follow. As in *State v. Young*, the use of “loose terms” leaves too many questions unanswered about what a statute prohibits and what it does not prohibit.

Respondent further suggests that a case from another jurisdiction is instructive on the issue involved in this case. In *State v. Aldrich*, 231 N.W.2d 890 (Iowa 1975), 81 ALR 3d 1062, the Iowa Supreme Court was called upon to answer a void for vagueness challenge to a statute making it a crime to deal improperly with a corpse. The statute in question made it a crime for “any person willfully and unnecessarily, and in an improper manner, indecently expose, throw away or abandon any human body or remains thereof in any public place, or in any river, stream, pond or other place, he shall be imprisoned ... or be fined.” The defendant in that case challenged the statute’s constitutionality, claiming that the phrase “improper manner” caused the statute to be void for vagueness. The court rejected that challenge, but only because it found that the phrase “improper manner” when “linked to the term ‘willfully’ and employed to assist in expressing a prohibition against throwing away or abandoning a human body in a public place or river” was not vague. The court’s rationale was that the term “improper manner” was tied to the statutorily required mental state of the person acting “willfully,” and that court further noted that under Iowa law the term “willful” carries the “connotation of

intentional indignities inconsistent with good faith and good intentions.” *Id* at 893. See, ANNOT: Validity, construction, and application of statutes making it a criminal offense to mistreat or wrongfully dispose of dead body. 81ALR 3d 1071.

Missouri courts have likewise rejected constitutional void for vagueness challenges by finding that an appropriate mental element is contained in the statute, thereby curing or avoiding the vagueness flaw of the statutory language. An example is *State v. Lee Mechanical Contractors, Inc.*, 938 S.W.2d 269 (Mo. banc 1997). In that case, this court rejected a void for vagueness challenge to a portion of Missouri’s prevailing wage law. This court held that the statute in question required the specific intent of “willfully” violating the statute, and this court went on to note that Missouri law considers the culpable mental state of “willfully” to be the same as “knowingly.” While this court and the Iowa Supreme Court may have different views of the meaning of the mental state “willfully,” both courts agree that if a statute contains a specific mental state element, then otherwise vague language in the statute may not be considered vague. In this case, there is no language in the statute specifying a mental state, and thus there is none to cure the obvious vagueness and ambiguity in the statutory language.

Respondent admits that the appellant is able to cite to this court far more cases where a void for vagueness constitutional challenge has been rejected by the courts. This would be expected, given the presumption of validity of statutes, and the fact that most such challenges are to establish laws which have been interpreted many times by appellate courts, or which involve words or phrases which have been given to meanings by judicial interpretation. The appellant in this case has in fact cited several cases where

void for vagueness challenges have been rejected by this court. However, none of those cases involve the peculiar language of this statute. Moreover, this statute has no prior interpretations, and does not contain tried and true phrases from other statutes which have a history of judicial interpretation for guidance.

Respondent suggests that the trial court correctly held this statute to be unconstitutionally vague because of its failure to give sufficient notice and fair warning to persons of ordinary intelligence of what conduct is prohibited and what obligations they may have under the statute, and it fails to give adequate and specific guidance to prosecuting authorities to prevent arbitrary and discriminatory application of the statute. For those reasons, the trial court's judgment should be affirmed.



## **CONCLUSION**

For the reasons stated herein, the judgment of the trial court should be affirmed, and RSMo. Section 194.425 should be held unconstitutional. In the alternative, this court should determine that the phrase “or leaves a corpse” as contained in RSMo. Section 194.425 should be interpreted to mean the same thing as “abandons, disposes, deserts” as contained in that statute.

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**CERTIFICATE OF COMPLAINT AND SERVICE**

Stephen C. Wilson, upon his oath, states as follows: (1) that ten copies of this brief have been hand delivered on this date to the Missouri Supreme Court; (2) that this brief was prepared using Microsoft Word, 13 pt. type, and this brief complies with the limitations contained in Rule 84.06 and contains 3,715 words, including the cover and this certification, as determined by Microsoft Word software; (3) that the floppy disk filed with this brief contains a copy of this brief and has been scanned for viruses with Norton Anti-virus 2000, updated 1/2/02, and is virus-free; and (4) that a floppy disk containing a copy of this brief has been hand delivered, along with two copies of this brief, to opposing counsel, Lora Cooper, at her business address of Courthouse, Jackson, Missouri, this 8<sup>th</sup> day of January, 2002.

\_\_\_\_\_  
Stephen C. Wilson

Subscribed and sworn to before me this 8<sup>th</sup> day of January, 2002.

\_\_\_\_\_  
Notary Public